



## Legal Update

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October 2018

***The Appeals Court holds that police need a search warrant to remove an item that is partially within a suspect's body cavity.***

***Commonwealth v. Jeannis***, 93 Mass. App. Ct. 856 (2018): After arresting the defendant, police brought him to station. The defendant began to complain that he did not feel well because he had swallowed "fifties." Although the defendant was not exhibiting any signs of drug overdose, police requested medical assistance. While police were booking the defendant, Lt. Callahan noticed that the defendant was, "oddly, leaning to one side." As Lt. Callahan brought him to a nearby cell, he noticed that the defendant had an unusual gait as he walked. The defendant moved slowly, was rigid and tense, and was "clenching his buttocks area."

Since police were concerned that there could potentially be a safety risk, they brought the defendant to a nearby cell and ordered him to remove his clothing. The defendant removed his shirt, pants, and socks and he became argumentative when asked to remove his underpants. While wearing only underwear, the defendant continued to clench his buttocks and attempted to shield his backside from the police officer's view. The defendant

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assumed a fighting stance which raised safety concerns. As a result, the police handcuffed one of the defendants' arms while the defendant pulled down his waistband and said "See I don't have anything."

The police saw a plastic bag partially protruding from the defendant's buttocks. Officer Singer ordered the defendant to remove the bag or have Singer remove it. The defendant removed the bag while Singer placed his hand on the defendant's hand. The bag contained fifteen individually wrapped bags of cocaine and thirteen individually wrapped bags of heroin.

The defendant moved to suppress the drugs. The defendant argued that this was not solely a search, but a seizure, of the plastic bag from a body cavity, his rectum, that required police to get a search warrant issued by a judge. The motion judge denied the motion and the defendant appealed his conviction.

**Conclusion:** The Appeals Court held that the search in this case was a body cavity search and police needed to get a warrant issued by a judge in order to seize the items partially inside of a suspect's body cavity.

**1<sup>st</sup> Issue: Whether the removal of the plastic bag from the defendant's rectum was a strip search or a manual body cavity search.**

The Commonwealth argued that the plastic bag was seized not from the defendant's rectum, but from what it refers to as his "intergluteal cleft." The lineage of cases indicate that items hidden between the buttocks are not within a "body cavity," and that if a strip search reveals items there that easily fall out, it has not necessarily crossed the line to a manual body cavity search. See *Commonwealth v. Vick*, 90 Mass. App. Ct. 622, 633 (2016) (observation of protruding bag of drugs that "was in the 'cleft' of the defendant's buttocks, and not lodged in his rectum," but which fell out with "mere flicking or brushing, involved nothing more intrusive than strip search).

The facts indicated that the plastic bag was not merely held between the defendant's buttocks. There was no testimony during the motion hearing that suggested the bag was simply lodged between the defendant's buttocks, entirely outside his rectum. The Appeals Court distinguished these facts from *Vick*, where the officer did not have to use force to get the bag out of any part of the body cavity. There was no testimony that the plastic bag was outside the defendant's rectum such that it easily fell or popped out when the defendant and the officer touched it. The police testified that the defendant "spread one cheek and we reached in and retrieved [the bag] from inside his butt," rather than from between his buttocks, and that "he helped me with the cuffs on to take the drugs out of his butt." Based on this testimony from the motion hearing, the Appeals Court concluded that the

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plastic bag was partially within the defendant's rectum. The Commonwealth failed to prove that no portion of the bag was within the defendant's rectum.

**2<sup>nd</sup> Issue: Whether the strip search in this case did not cross over to a manual body cavity search because the police did not "manipulate the defendant's body" or "touch or probe the defendant's body cavities," but instead had the defendant remove the baggie himself.**

The Appeals Court found that it was irrelevant whether the defendant removed the bag himself because the police ordered him to do so and threatened that if the defendant did not remove the bag police would. When a defendant gives something to a police officer after being ordered to do so, the police are nonetheless responsible for the seizure. See, e.g., *Commonwealth v. Torres*, 424 Mass. 153, 156 (1997) (trooper seized defendant's wallet when trooper "had [the defendant] turn around and motioned for [the defendant's] wallet by pointing to his rear pants pocket and opening and closing his hand," and defendant "produced his wallet for the trooper").

**3<sup>rd</sup> Issue: Whether an item partially protruding from an arrestee's rectum can be seized without a search warrant.**

There was a seizure from the defendant's body cavity. The removal of an item from within a body cavity from which it is protruding is no less serious an invasion of one's body than a search of that cavity for evidence in the first place. Manual body cavity searches require a judicially authorized warrant based on a particularized need supported by heightened probable cause. Based on the facts in this case, the Appeals Court concluded that the same requirements apply with respect to a seizure of an item protruding from within a body cavity.

Lastly, the Appeals Court found that there were no exigent circumstances that diminished the police's ability to obtain a judicial warrant. The facts here indicated that the defendant was completely naked and handcuffed in a jail cell. While there was heightened probable cause to believe that the bag protruding from the defendant's rectum contained contraband, it was seized without a judicial warrant in circumstances that do not justify failure to obtain one. Consequently, the Appeals Court held that the motion to suppress should have been allowed and set aside the verdicts.

**Commentary:** Police should get a search warrant issued by a judge if an item is partially within a suspect's body cavity. If the police order a suspect to remove the item himself, this will not be viewed as a consensual search.

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